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No. 71-763

In the Supreme Court of the United States

OCTOBER TERM, 1971

PERRY BRADSHAW, ET AL., PETITIONERS

v.

MELVIN LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioners are aircraft examiners employed at the Norfolk Naval Shipyard. They instituted this class action contending that the use by the Secretary of the Navy of a "percentage differential" system in calculating their wages was improper under 5 U.S.C. 5341 and that, even applying that system, the evidence before the Secretary warranted an increase in the differential. Petitioners contend that they have been denied proper wages since 1963. The district court upheld the validity of the percentage differential system and found that there was no factual basis for petitioners' contention that the differential should be increased (Pet. App. 1a–7a; 319 F. Supp. 390). Rely-

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ing on the opinion of the district court, the court of appeals affirmed *per curiam* (Pet. App. 8a-9a).

The background and operation of the percentage differential pay system, which is used throughout the executive branch for paying blue-collar supervisors like petitioners, are set forth in respondents' brief in opposition in *Rogers* v. *Laird,* O.T. 1971, No. 71-242, certiorari denied, October 26, 1971. Under this system, the Navy calculates the prevailing wage in each geographical area for blue-collar journeymen, and pays the supervisor a fixed percentage above that wage. Such a system is widely used in private industry. Its use by the government is necessitated, in part, by the fact that blue-collar supervisory positions in private industry frequently do not correspond to those in the government. The percentage differential is also used to compute the pay of aircraft examiners and other positions which are known as "production facilitating" trades. These positions fall between the mechanic and supervisory level (Tr. 132, 144).[1] The aircraft examiner is paid a fixed percentage above the wage of the mechanics whom he supervises. The differential is used because there is no counterpart to aircraft examiner in private industry (Pet. App. 3a).

The differential level is reviewed periodically and in 1963 the differential was increased from 12 to 16 percent to reflect the increasing complexity of the aircraft examiner's work (Pet. App. 4a, 20a). In addition, aircraft examiners receive salary increases whenever the

[1] "Tr." references are to the transcript of testimony in the district court. "App." references are to the joint appendix filed in the court of appeals.

mechanics' pay is increased; this has occurred annually since 1947 (App. a45).

The Secretary reviewed the differential in 1967, and concluded that an increase was not warranted (Pet. App. 20a). Late in 1967, the Navy conducted audits at the Norfolk Naval Shipyard and at the North Island, California Shipyard. The Norfolk audit recommended that no change be made in the differential rate and the North Island audit concluded that the existing differential "was too high" (Tr. 153, 161). The Navy concluded that the differential should not be increased (Tr. 126).

In 1968, the Civil Service Commission was given the responsibility for establishing blue-collar wages for all government employees under 5 U.S.C. 5341 (Tr. 141–142).[2] The Commission authorized the Navy to restudy the examiner position and, following a full review of all the evidence, the Navy concluded that "the duties and responsibilities of Aircraft Examiners did not call for an increase in their percentage differential" (Pet. App. 5a). Thereafter in 1969, following an increase granted for supervisory positions, the Commission increased the aircraft examiner's differential to 19.2 percent (Pet. App. 4a).

2. The issue whether the use of a percentage differential is a permissible exercise of the Secretary's

[2] The Coordinated Federal Wage System, as originally designed, recognized only supervisory or nonsupervisory positions in its salary schedules (App. a44). Along with certain other jobs, aircraft examiners fit in neither category (Tr. 143). Accordingly, these jobs were "set aside" pending implementation of the System, when the Commission would study the jobs to determine "whether we have to adjust the existing schedules or whether we have to introduce new schedules" (App. a44).

discretion under 5 U.S.C. 5341 was determined in favor of the Secretary in *Rogers* v. *Laird*, 319 F. Supp. 1 (E.D. Va.), affirmed *per curiam*, C.A. 4, No. 15,312, May 19, 1971, certiorari denied, October 26, 1971 (No. 71-242). There is nothing unique in the present case which warrants any different result.[3]

The remaining issue is a factual one—whether the evidence presented to the Secretary was such that he acted arbitrarily in failing to increase further the wages paid petitioners and the class they represent. After a careful review of the relevant information, he concluded that petitioners' duties and responsibilities did not warrant an increase. The district court, in a holding concurred by the court of appeals, concluded that the evidence did not support petitioners' contention that they were entitled to an increase. These factual findings were correct and further review is not warranted.[4]

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[3] As we have noted, the district court expressly found—and petitioners do not contend to the contrary (Pet. 14)—that positions comparable to that of aircraft examiner do not exist in private industry (Pet. App. 3a). Thus, use of a direct comparison method for computing wages, rather than a percentage differential, would be impossible.

[4] Petitioners' contention that every audit conducted by the Navy established a need for higher wages (Pet. 4) overlooks the fact that both the 1967 audits recommended against an increase. It also fails to take account of the testimony of Phillip Meyerson, Director of the Personnel Management Division of the Office of Civilian Manpower Management, that the Navy reviewed all the recommendations and concluded that an increase could not be justified (Pet. 5a-6a). The district court properly characterized the recommendations on which petitioners rely as having been "made by subordinates whose investigations were rather limited and, in some cases, based solely on briefings by the Examiners themselves" (Pet. App. 5a).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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